of the hall and gardens and he held that it was a mere licence.

In *Daly v. Edwardes,*[2] a licence was granted for the use of the refreshment rooms etc., in Daly's theatre. It was held that looking at the document as a whole the fair effect of it was that licence instead of a lease was really what was intended by the parties even though the words demise, rent and other words which if regarded from a strict conveyancer's point of view might be held to be the granting of an interest or an estate in some part of the theatre.

Lord Alverstone said "Concurrently with that exclusive use of portions of the premises during the time that they wanted to supply refreshment there was the right of audience to pass through to the other parts and the right of the landlord to go for the purpose of repairs and lighting and different things of that kind and also for getting at the stores which were jointly used". He held that there was an exclusive privilege to supply refreshments and the appropriation for the purpose of that privilege of certain spaces with the concurrent right on the part of Daly and his servants and visitors to the theatre to use such parts of those spaces as were not for the time being required in the due exercise by the licensees of the privilege they had.

In *Warr v. London County Council* the contract gave to the plaintiffs an exclusive right for a term of years to supply refreshment for the theatre and that for that purpose they should have the necessary use of the refreshment rooms etc. and an exclusive right to advertise in certain parts of the theatre. It was held that the contract did not confer an interest in the land on the licensee.

Waltons Harvey v. Walker Homfray is to much the same effect.

On the other hand the Commissioner produced cases which appear to me to be far more in accord with the case now under consideration, particularly in *Re Burmah Oil Shell Storage Co., Ltd.,*[1] and *Young & Co., v. Liverpool Assessment Committee*[8]. The Indian case was a stamping case under the Indian Stamp Act 2 of 1899 where a lease is defined in terms almost identical with those in our Stamps Ordinance. In that case the Company was to have the use or occupation of certain railway land belonging to the estate for the purpose of constructing petroleum storage installations and were to pay a certain monthly rent for the use of the plot. The Company were to erect certain constructions of a permanent character. The document was described as a licence and was revocable by seven days' notice on breach of certain conditions and either party could determine it by 3 months' notice at any time. The deed expressly provided that nothing contained in it should be construed to create a tenancy. The only substantial difference I can see between that case and the one under consideration was that the licensee was to erect the buildings whereas in this case building is already erected. Yet in the Indian case the document was held to be a lease.

The second case was a lease of certain section of a wharf and warehouse and it was argued that it was not a lease so as to make the occupiers rateable because they had not the exclusive use of the premises. But it was held that the nature of the respondents' business was not consistent with anything but exclusive occupation subject to the control of the Customs Authority and that the privileges given to the Board (which provided for special rights of access) were only occasioned by the fact that there was upon the demised property machinery which the Board wished to utilize during the term.

Other cases quoted by the Solicitor General were much to the same effect, notably, *Selby v. Greaves,*[5] but I do not consider it necessary to go further into these cases.

I therefore hold that the assessment of the Commissioner so far as it charges the document called a co-licence as a lease is right but the stamp fee should be $197/-. The applicants to pay the costs of the motion.

Commissioner's adjudication confirmed.

[IN THE COURT OF CRIMINAL APPEAL]

McELWAINE, C.J., GORDON-SMITH, Ag. J.A. & PEDLOW, J.

December 15, 1939.

T'NG BAN YICK v. REX.

[SINGAPORE CRIMINAL APPEAL No. 10 of 1939]

Penal Code, s. 34—Common intention—direction to Jury—propriety of.

The appellant and one who had not been brought to justice attempted to rob one O.C.Y. and in the course of a struggle stabbed O.C.Y. in the side and inflicted a wound from which he died about fourteen hours later. The appellant was convicted of murder, the prosecution resting its case on the allegation that the appellant had an intent common with X that the deceased should be

stabbed fatally in the event of his refusing to stand and deliver. The trial judge directed the Jury, inter alia, that they should consider the questions, whether the other man and the appellant had conspired to commit robbery, whether the appellant knew that the other man had been armed with a knife and whether it was a part of the conspiracy that the knife should be used, if necessary, even to the point of causing death or injury which they knew to be likely to cause death, and that if the Jury returned an affirmative answer to all those questions, then the Jury should find the appellant guilty of murder.

Held, that the above direction was a proper and adequate direction on common intention.

Case referred to:—

(1) *Betts & Ridley,* 22 Cr. App. Rep. 148.

CRIMINAL APPEAL.

Edwards-Ker for the appellant.

Griffith-Jones, Crown Counsel, for the Crown.

Cur. Adv. Vult.

McElwaine, C.J. & Gordon-Smith, J.A.—For the purposes of this appeal the following facts (some of which were hotly disputed at the trial) were admitted or at least not denied.

At 1 a.m. on the 8th June the appellant and a man who has not been brought to justice and whom we will call X attempted to rob Ong Chow Yee, and in the course of a struggle X stabbed Ong Chow Yee in the side, piercing the spleen and inflicting a wound likely to cause death and from which Ong Chow Yee, in fact, died about fourteen hours later.

We will assume in favour of the appellant that the actual stabber was X as the case was argued on this assumption, but we point out that it is by no means clear that the appellant himself was not the actual stabber.

The appellant was convicted of the murder of Ong Chow Yee, the Crown resting its case on the allegation that the appellant had an intent common with X that the deceased should be stabbed fatally in the event of his refusing to stand and deliver.

For the appellant five points were argued. First that the judge did not adequately direct the jury on common intent, secondly that he did not tell the jury that if they had any doubt of the accused's intention that the deceased should be fatally injured, they must acquit; thirdly, that there was no evidence from which the jury could infer an intent in the appellant to kill; fourthly, that the jury should have been directed to consider the evidence which related to X and the evidence which related to the appellant separately, and fifthly, that the jury should have been directed to consider whether, if there was any common intent, it was an intent to do no more than grievous or ordinary hurt.

The deceased made a statement to the Police which was admissible under section 32 of the Evidence Ordinance. He told them that two men came up to him and said "if you do not give we will stab you". Whether both said this or only one of them is not of great importance as both were together.

One of the drawbacks of an *alibi* defence is that it generally precludes a defence in the way of confession and avoidance, such as self-defence, and in a case like the present precluded the defence from giving any evidence on the issue of the appellant's intent, though, of course, any evidence adduced by the prosecution which was favourable to him must be put to the jury.

The learned judge is recorded as having told the jury that it was unnecessary to go into section 34 of the Penal Code "because it obviously does not mean what it says". If this is a correct report the expression is somewhat infelicitous. What is important is, did the judge properly direct the jury on the substance of this section? He told them that "What is called the doctrine of common intention in English law has no application whatever in this Colony", obviously having in mind that section 34 of the Penal Code rather than such cases as *Betts & Ridley*(1) is the governing provision.

It is desirable to set out some passages in the summing up:—

> "The second question to ask yourselves is: Did the prisoner know that the other man had a knife? That, gentlemen, is a matter either way: you may infer that he did not know and you may infer that he did know; and it is a matter for you. Two men going out to commit a crime of this kind—you are entitled to draw the inference that he did know, that the prisoner did know that the other man had a knife. And the third question to ask yourselves is: Was it part of the conspiracy that the knife should be used, if necessary, even to the point of causing death or injury which they knew to be likely to cause death? Gentlemen, that is what you have to consider. It is a question of the knowledge and the intention of these two men and a question now of the knowledge and the intention of the prisoner: and the questions again, may I repeat them? "Did the other man and the prisoner conspire to commit robbery?"; secondly, "Did the prisoner know that the other man was armed with a knife?"; thirdly, "Was it part of the conspiracy that the knife should be used, if necessary, even to the point of causing death or injury which they knew to be likely to cause death?" You may infer, gentlemen, an affirmative answer to all those questions from the evidence, and if you do infer an affirmative answer—the answer "yes" to all those questions—then the prisoner is guilty of murder. If you have any doubt, gentlemen, as to the answer to any of those questions, then you will find the prisoner not guilty.

This clearly put the question of the appellant's intention to the jury and it also directed that if they had any doubt, which, reading the passage as a whole, must mean any doubt as to his intention, they must acquit. The statement of the deceased about the threat to stab was evidence which the jury could take into consideration.

The learned judge then proceeded:—

> "There is one other point with regard to the intention and that is, assuming you are satisfied that these two persons conspired to rob and that you are satisfied that the prisoner knew the other man had a knife and was prepared to use it, you might have doubts of the intention to use it either to cause death or to cause an injury which they knew would be likely to cause death. But it might occur that a knife was used not with any intention of causing death or of causing an injury which they knew to be likely to cause death. But it is not what actually happens that you consider—it is the intention of the man who inflicts the wound, and you may infer when a wound of that kind is caused—driving this knife, inwards, downwards in that part of the body—you may infer an intention to cause an injury which is known to be likely to cause death. You may, if you have a doubt on the matter, you may infer that there was no intention in either of these matters and that there was an intention merely to cause grievous hurt. But what you have to be satisfied of in the main is the intention with which these people set out and if you are satisfied as I have already explained to you, that there was an intention to use that knife, if necessary even to the point of causing serious injury which they knew would be likely to cause death, these men would be guilty of murder."

We do not think any exception can be taken to this passage in the summing up. It was necessary for the jury to consider the intention of X in ascertaining the intention of the appellant because the question being, whether the appellant had a common intention with X, then if that is answered in the affirmative, it is necessary to ascertain what X's intention was in order to ascertain what was the intention which the appellant had in common with X.

There was evidence from which the jury could infer that X intended to cause such bodily injury as he knew to be likely to cause death or that he intended to inflict an injury which was sufficient in the ordinary course of nature to cause death, and there was evidence from which they could infer that the appellant shared this intention with X, in other words that he had a common intention with X that these injuries should be inflicted.

As we have pointed out, the defence being an *alibi* the appellant could give no evidence about what he intended to do to effect the robbery, or that he first heard of X's intent to stab when it was too late for him to withdraw or to disassociate himself with X's intent.

We cannot say that there was no evidence from which the jury might not reasonably infer that the appellant set out with X to commit robbery and that both intended to effect that robbery by inflicting fatal injury on the victim.

We are also of opinion that proper and adequate direction was given by the judge on common intention.

The appeal is dismissed.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

April 1, 1940.

IN RE ESTATE DUTY ORDINANCE, 1929, S. 36.

IN RE THE ESTATE OF T.M.R.M. VENGADASALAM CHETTIAR DECEASED.

[PENANG ORIGINATING PETITION No. 14 of 1939]

Estate Duty Ordinance, s. 36, sub-s. 1—Property of joint Hindu family—Whether property standing in the name of one member of joint Hindu family who subsequently dies is chargeable with estate duty on the whole of the value of such property or not.

A Hindu testator died leaving a will in which he stated he was the sole owner of a one half share in a Chettiar firm known as M.R.M.A. In connection with the probate of his will questions arose as to the valuation of this asset for the purpose of assessment of estate duty. The executor on behalf of two sons of the deceased contended that at the time of the death of the testator he was a member of an undivided joint Hindu family comprising the Testator and his said two sons and that such joint Hindu family (and not the testator himself) was the owner of the said one half share in the said Chettiar firm. The Commissioner of estate duties rejected that contention and the executor thereupon applied by originating petition under s. 36, sub-s. 1 of the Estate Duty Ordinance.

Held, (1) that the executor was not estopped from denying the statement contained in the testator's will to the effect that the testator was the sole owner of the one half share in the said Chettiar firm.

(2) that the Hindu law relating to joint Hindu families and joint Hindu family property is applicable to a case such as this in the Straits Settlements.

(3) that where a joint Hindu family is constituted by a father and his two sons, both the latter being under age, the father is the manager of the joint Hindu family property with wide powers of management and he is also the **de facto** guardian of the co-parcenary interests therein of his two sons so long as they remain minors but neither such powers of management nor his position of guardian enables the father to dispose of any part of the joint Hindu family property by will.